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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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PATRICIA CALKINS, f/n/a/
PATRICIA OETMAN,

No. CIV. 08-2205 FCD DAD

Plaintiff,

v.

MEMORANDUM AND ORDER

BANKERS LIFE AND CASUALTY
COMPANY; MICHAEL A. NOWAK; THE
BUNKER INSURANCE GROUP, INC.,

Defendants.

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This matter is before the court on defendant Bankers Life and Casualty Company's ("Bankers") motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Patricia Calkins' ("Calkins") opposes the motion. For the reasons set forth below,¹ defendant Bankers' motion to DISMISS is GRANTED without prejudice.

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¹ Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs. E.D. Cal. L. R. 78-230(h).

1 **BACKGROUND**

2 Plaintiff Calkins is a California resident who purchased a
3 Long Term Care Policy (the "Policy") from defendant Bankers in
4 1999. (Compl., Ex. 1 to Notice of Removal, filed Sept. 17, 2008,
5 ¶ 9.) Plaintiff alleges that at the time she purchased the
6 Policy, she was told that the premiums would never increase.
7 (Id. ¶ 5.) Specifically, plaintiff contends that Bankers,
8 through its agent defendant Michael Nowak ("Nowak"),
9 misrepresented the term "'guaranteed renewable,' which
10 necessarily implies an actuarially sound premium that can be
11 anticipated to remain level throughout the life of the policy."
12 (Id. ¶ 28.) Plaintiff relied on these representations when she
13 purchased the Policy. (Id. ¶ 5.)

14 Approximately 7 years later, in or about 2006, Bankers
15 raised the premiums on plaintiff's Policy. (Id. ¶ 9.) Plaintiff
16 contends that defendants "unreasonably and intentionally failed
17 to disclose the known and/or reasonably foreseeable risks of rate
18 increases on the subject Policy." (Id. ¶ 18.) Plaintiff also
19 contends that Bankers intentionally sold the Policy at a lower
20 price to increase its long term care market share, knowing that
21 the lapse/termination rates and investment returns used in its
22 actuarial assumptions to price the subject Policy were too high
23 and would lead to subsequent increases in premiums to cover
24 claims. (Id. ¶ 28.)

25 On July 25, 2008, plaintiff filed a complaint in the
26 Superior Court of California for the County of Placer, alleging
27 claims for (1) Negligent Misrepresentation against all
28 defendants; (2) Intentional Misrepresentation against all

1 defendants; and (3) Professional Negligence against defendant
2 Nowak and The Bunker Insurance Group, Inc. ("Bunker"). (Id.)

3 **STANDARD**

4 On a motion to dismiss, the allegations of the complaint
5 must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322
6 (1972). The court is bound to give plaintiff the benefit of
7 every reasonable inference to be drawn from the "well-pleaded"
8 allegations of the complaint. Retail Clerks Int'l Ass'n v.
9 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff
10 need not necessarily plead a particular fact if that fact is a
11 reasonable inference from facts properly alleged. See id.

12 Nevertheless, it is inappropriate to assume that the
13 plaintiff "can prove facts which it has not alleged or that the
14 defendants have violated the . . . laws in ways that have not
15 been alleged." Associated Gen. Contractors of Calif., Inc. v.
16 Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983).
17 Moreover, the court "need not assume the truth of legal
18 conclusions cast in the form of factual allegations." United
19 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
20 Cir. 1986).

21 Ultimately, the court may not dismiss a complaint in which
22 the plaintiff alleged "enough facts to state a claim to relief
23 that is plausible on its face." Bell Atlantic Corp. v. Twombly,
24 127 S. Ct. 1955, 1973 (2007). Only where a plaintiff has not
25 "nudged [his or her] claims across the line from conceivable to
26 plausible," is the complaint properly dismissed. Id. "[A] court
27 may dismiss a complaint only if it is clear that no relief could
28 be granted under any set of facts that could be proved consistent

1 with the allegations." Swierkiewicz v. Sorema N.A., 534 U.S.
2 506, 514 (2002) (quoting Hudson v. King & Spalding, 467 U.S. 69,
3 73 (1984)).

4 In ruling upon a motion to dismiss, the court may consider
5 only the complaint, any exhibits thereto, and matters which may
6 be judicially noticed pursuant to Federal Rule of Evidence 201.
7 See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th
8 Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United
9 States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

10 ANALYSIS

11 A. California's Regulatory Scheme

12 Defendant Bankers moves to dismiss plaintiff's complaint on
13 the basis that insurance premiums are subject to comprehensive
14 regulation in California pursuant to the California Insurance
15 Code, and the Department of Insurance (the "DOI") has exclusive
16 original jurisdiction over all matters related to ratemaking.
17 Bankers argues that because an adjudication in favor of plaintiff
18 would have a rate-setting effect, plaintiff's actions are barred
19 to the extent she has failed to exhaust administrative remedies.
20 Plaintiff does not contest the DOI's power to approve premium
21 increases, nor does she claim that Bankers' premiums are
22 excessive. (Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Opp'n"),
23 filed Dec. 30, 2008, at 4.) Rather, plaintiff argues that the
24 rate increase should not apply to her because defendant allegedly
25 made material misrepresentations to her regarding the potential
26 for rate increases.

27 Proposition 103 significantly modified the insurance
28 regulatory regime by vesting the power to enforce the Insurance

1 Code in the public as well as the Insurance Commissioner (the
2 "Commissioner"). Donabedian c. Mercury Ins. Co., 116 Cal. App.
3 4th 968, 982 (2004). Prior to the passage of Proposition 103,
4 California was an "open-rate state," in which rate were set by
5 insurers without approval by the Commissioner. Id. at 981
6 (internal quotations omitted). Subsequent to the passage of the
7 initiative, an insurer who seeks to change any rate must file a
8 rate application with the Commissioner, and the Commissioner must
9 notify the public of that application." Id. at 982.

10 "Under the statutory scheme enacted by the voters, the
11 charging of an approved rate cannot be deemed 'illegal' or
12 'unfair' for purposes of the Unfair Business Practices Act or,
13 indeed, tortious." Walker v. Allstate Indem. Co., 77 Cal. App.
14 4th 750, 756 (2000). More specifically, sections 1860.1 and
15 1860.2 of the Insurance Code remove certain matters related to
16 the setting and charging of insurance rates from the ambit of the
17 courts. Walker v. Allstate Indem. Co., 77 Cal. App. 4th 750
18 (2000). Section 1860.1 provides:

19 No act done, action taken or agreement made pursuant to
20 the authority conferred by this chapter shall
21 constitute a violation of or grounds for prosecution or
22 civil proceedings under any other law of this State
heretofore or hereafter enacted which does not
specifically refer to insurance.

23 Cal. Ins. Code § 1860.1 (West 2009). Moreover, section 1860.2
24 provides that "[t]he administration and enforcement of this
25 chapter shall be governed solely by the provisions of this
26 chapter." Cal. Ins. Code § 1860.2 (West 2009).

27 California's statutory scheme has been interpreted to bar
28 claims against multiple insurers based upon the charging of an

1 allegedly excessive rate that has been approved by the
2 Commissioner. Walker, 77 Cal. App. 4th at 756. In Walker, the
3 plaintiff filed suit on behalf of a putative class of automobile
4 insurance customers against over 70 insurers. Id. at 752. Each
5 of the causes of action were "bottomed on the insurers' charging
6 approved rates alleged nevertheless to be 'excessive' within the
7 meaning of" the Insurance Code. Id. at 753. The court reasoned
8 that "[i]f section 1860.1 has any meaning whatsoever," it vests
9 exclusive jurisdiction over ratesetting activities in the
10 Commissioner. Id. at 756. As such, under these circumstances,
11 the Walker court held that explicit statutory authority precludes
12 civil challenges seeking to recoup premiums charged pursuant to
13 approved rates. Id. at 760.

14 However, claims by an insured arising out of the unilateral
15 conduct of a single insurer in its application of the Insurance
16 Code is not precluded by sections 1860.1 and 1860.2. Donabedian,
17 116 Cal. App. 4th at 990. In Donabedian, the plaintiff brought a
18 claim under the California Unfair Competition Law ("UCL")
19 alleging that the defendant insurer effectually deprived
20 policyholders of a discount in violation of the Insurance Code.
21 Id. at 972-75. The insurer asserted that the insured's claims
22 were barred by sections 1860.1 and 1860.2 because the
23 Commissioner has exclusive jurisdiction over the type of claim
24 raised. Id. at 977, 983. The Donabedian court held that the
25 plaintiff's claim, which challenged the unilateral conduct of a
26 single insurer, did not involve concerted action, and had no
27 anti-trust implications, was not a "ratemaking case" to which
28 sections 1860.1 and 1860.2 applied. Id. at 983, 990-91

1 ("Whatever limited force Insurance Code sections 1860.1 and
2 1860.2 can be said to have today, a fair reading of those
3 provisions in context cannot immunize insurers from civil
4 liability for illegal procedures that are creatively stowed away
5 in a voluminous regulatory filing."). The court distinguished
6 the claims addressed by the Walker court because the claim in
7 Walker challenged approved rates and "rested on amorphous
8 concepts such as 'industry trends,' 'rates of return earned by
9 individual insurers,' and 'generic factors.'" Id. at 991-92
10 (quoting Walker, 77 Cal. App. 4th at 753). Conversely, the claim
11 before the court in Donabedian was based upon an alleged
12 violation of the Insurance Code *as applied* and did not implicate
13 any of the ratemaking steps which requires the Commissioner to
14 exercise his technical expertise. Id. at 992-93. Moreover, the
15 Donabedian court held that the UCL claim, though based upon a
16 violation of the insurance code, did not come within the
17 exclusive jurisdiction of the Commissioner. Id. at 986-88.
18 Accordingly, the court held that relief was not barred and
19 exhaustion of administrative remedies was not required. Id. at
20 992-93.

21 The court holds that plaintiff Calkins' claims are not
22 precluded by sections 1860.1 and 1860.2 because the allegations
23 in the complaint challenge the application of the rates *as*
24 *applied*, not whether the rates are excessive generally.
25 Specifically, plaintiff contends that there were material
26 misrepresentations made to her at the time she purchased the
27 Policy. Her challenges are based upon the unilateral conduct of
28 a single insurer and, unlike the claims in Walker, do not

1 challenge the Commissioner's expertise with respect to the
2 setting of rates. As such, under the rationale set forth by the
3 court in Donabedian, this is not a "ratemaking case" and the
4 exhaustion² of administrative procedures is not required.

5 Defendant argues that because plaintiff seeks damages, "an
6 adjudication in favor of Calkins would have a rate-setting
7 effect" because Bankers "would have to return past premiums and
8 would be effectively precluded from future rate increases."
9 (Def.'s Reply in Supp. of Mot. to Dismiss ("Reply"), filed Jan.
10 8, 2009, at 3.) "A judicial act constitutes rate regulation only
11 if its principal purpose and direct effect are to control rates."
12 Spielholz v. Superior Court, 86 Cal. App. 4th 1366, 1374 (2001).
13 However, where a claim does not directly challenge the rate, but
14 challenges some other activity, such as false advertising or
15 fraud, "and seeks a remedy to limit or control that activity or
16 seeks damages from that activity," that claim is not an attempt
17 to regulate rates, "even if the court determines the value of the
18 services provided in awarding damages or restitution." Id. at
19

20 ² Defendant contends that Donabedian is distinguishable
21 because the plaintiff in that case first submitted a claim to the
22 DOI, and thus, there was no issue with respect to the exhaustion
23 of administrative remedies. (Def.'s Reply at 5.) Defendant's
24 contention misconstrues the reasoning and holding of Donabedian.
25 The Donabedian court explained that "exhaustion" applies where a
26 claim is cognizable in the first instance only by an
27 administrative agency. Id. at 985. The court explicitly held
28 that the UCL claim, which is akin to the tort claims brought by
plaintiff in this case, did not require exhaustion because the
agency did not have exclusive jurisdiction. Id. at 986. The
court noted that the trial court stayed the action pursuant to
the doctrine of *primary jurisdiction*. Id. (noting that the
Commissioner was to provide "an *initial* assessment, not a final
determination"). However, nowhere in its papers does Bankers
raise the doctrine of primary jurisdiction or request a stay
pursuant to that doctrine.

1 1375-76 (holding that an award of damages or restitution for
2 false advertising that requires the court to determine the value
3 of services provided is not rate regulation). Plaintiff's claim
4 does not challenge the reasonableness of the rate. Rather, it
5 challenges the conduct of defendant arising out of its allegedly
6 intentional and/or negligent misrepresentations at the time of
7 sale regarding the increase in premium payments. Any award of
8 damages would be directed to compensation for or determent from
9 that activity. As such, it would not constitute rate regulation.
10 Id. at 1376.

11 Therefore, Bankers' assertion that plaintiff's claims must
12 be dismissed because it is barred by the Insurance Code is
13 without merit.

14 **B. Statute of Limitations**

15 Defendant Bankers also moves to dismiss plaintiff's
16 complaint on the basis that her claims are barred by the statute
17 of limitations. Specifically, Bankers argues that Calkins had
18 constructive, if not actual, knowledge of the misrepresentations
19 in October 1999, when she received a copy of the Policy, which
20 provides:

21 RENEWAL PREMIUM

22 We may change the premium rates for this policy. We
23 can change the premium only if We change it for all
24 policies like Yours in Your state on a class basis.
We'll provide You with written notice of any change in
the premium in the time required by your State.

25 (Def.'s Mot. to Dismiss ("Mot."), filed Oct. 1, 2008, at 10; Ex.
26 A to Compl.) Plaintiff argues that she was told by Bankers Life
27 that the term "guaranteed renewable" meant that her premiums
28 would never increase, and thus, she did not have actual or

1 constructive notice of the misrepresentations until 2006 when her
2 premium payments increased. (Opp'n at 7-8.)

3 Section 338(d) of the California Code of Civil Procedure
4 allows a party to file "[a]n action for relief on the ground of
5 fraud or mistake" within three years. "The cause of action . . .
6 is not deemed to have accrued until the discovery, by the
7 aggrieved party, of the facts constituting the fraud or mistake."
8 Cal. Code Civ. Proc. § 338(d) (West 2009). Generally, with
9 respect to torts, "a claim accrues and the statute of limitations
10 'begins to run upon the occurrence of the last event essential to
11 the cause of action, even if the plaintiff is unaware that the
12 cause of action exists." Shamsian v. Atlantic Richfield Co., 107
13 Cal. App. 4th 967, 979 (2003) (quoting Wilshire Westwood Assocs.
14 v. Atlantic Richfield Co., 20 Cal. App. 4th 732, 739 (1993)).

15 "However, the discovery rule postpones commencement of the
16 limitation period until the plaintiff discovers or should have
17 discovered the facts essential to his cause of action." Id. at
18 980. A plaintiff is charged with presumptive knowledge for the
19 purpose of commencing the statute of limitations when she has
20 notice or information sufficient to put a reasonable person on
21 inquiry. Id.

22 With respect to the failure to discover a term in a
23 contract, the failure to read the contract is a circumstance to
24 be considered by the court, but is not necessarily determinative.
25 Laing v. Occidental Life Ins. Co., 244 Cal. App. 2d 811, 818
26 (1966). "Furthermore, many cases have held that the presumption
27 that persons are familiar with the terms of written contracts are
28 not strictly applied to insurance contracts." Id. (citing Raulet

1 (Ex. A to Compl.) Taking plaintiff's allegations as true,
2 drawing all reasonable inferences therefrom, and viewing them in
3 the light most favorable to the plaintiff, the court cannot
4 conclude as a matter of law that plaintiff had sufficient
5 information or notice of the alleged misrepresentations to
6 commence the statute of limitations at the time plaintiff
7 received the written Policy. As such, at this stage in the
8 litigation, the court cannot hold that plaintiff's claims are
9 barred by the statute of limitations.

10 **C. Fraud Allegations**

11 Finally, defendant Bankers moves to dismiss plaintiff's
12 claims on the basis that she has not alleged intentional and
13 negligent misrepresentation with particularity. Plaintiff
14 contends that her allegations are sufficient to give defendant
15 notice of the claims against it.

16 Rule 9(b) of the Federal Rules of Civil Procedure provides
17 that "[i]n all averments of fraud or mistake, the circumstances
18 constituting fraud or mistake shall be stated with
19 particularity." In order to comply with the requirements of Rule
20 9(b), the circumstances constituting the alleged fraud "must be
21 'specific enough to give defendants notice of the particular
22 misconduct which is alleged to constitute the fraud charged so
23 that they can defend against the charge and not just deny that
24 they have done anything wrong.'" Bly-Magee v. California, 236
25 F.3d 1014, 1019 (9th Cir. 2001) (quoting Neubronner v. Milken, 6
26 F.3d 666, 672 (9th Cir. 1993)). "Averments of fraud must be
27 accompanied by 'the who, what, when, where, and how' of the
28 misconduct charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d

1 1097, 1106 (9th Cir. 2003) (quoting Cooper v. Pickett, 137 F.3d
2 616, 627 (9th Cir. 1997)). The plaintiff "must set forth more
3 than the neutral facts necessary to identify the transaction.
4 The plaintiff must set forth what is false or misleading about a
5 statement, and why it is false." Id. (quoting Decker v. GlenFed,
6 Inc., 42 F.3d 1541, 1548 (9th Cir. 1994)) (emphasis in original).

7 Plaintiff's allegations are insufficient to give defendant
8 notice of the particular misconduct charged. Plaintiff alleges
9 that defendant Bankers, through its agent defendant Nowak,³
10 promised her that the premiums on the Policy would not increase
11 during the sale of the Policy. (Compl. ¶¶ 7, 18, 28, 32.) She
12 also alleges that these statements were ultimately false, as her
13 premiums were raised in 2006. (Compl. ¶ 6, 21-23.) Moreover,
14 plaintiff alleges that she had relied upon these representations
15 in purchasing the Policy. (Compl. ¶¶ 37-41, 44, 57.) However,
16 while plaintiff has identified that she applied for the Policy on
17 August 24, 1999 and that the Policy was issued on October 10,
18 1999, she has not alleged when the statements she relied upon in
19 purchasing the Policy were made or in what manner they were made.
20 Without such information, plaintiff's allegations plaintiff's
21 general allegations would put defendant in the untenable position
22 of having to deny that its representative, Nowak, has ever done
23 anything wrong in regards to his sale of the Policy to plaintiff,
24 a circumstance that Rule 9(b) demands be avoided. See, e.g.,
25 Vess, 317 F.3d at 1106 (dismissing plaintiff's fraud claims where
26

27 ³ To the extent plaintiff seeks to assert claims based
28 upon statements made by representatives other than Nowak, she has
not stated those claims with particularity.

1 plaintiff failed to provide the particulars of when, where, or
2 how the alleged conspiracy occurred); United States v. SmithKline
3 Beecham, 245 F.3d 1048, 1051 (9th Cir. 2001) (holding that broad
4 allegation that the defendant "knowingly . . . changed control
5 numbers to wrongfully represent lab results did not satisfy Rule
6 9(b) where the plaintiff did not specify the types of tests, the
7 employees who performed the tests, or the dates, time, or places
8 where the tests were conducted); Decker, 42 F.3d at 1547-48
9 (requiring the plaintiff to state the time, place, and content of
10 an alleged misrepresentation and explain why the statement is
11 false and misleading in order to satisfy Rule 9(b)); U.S.
12 Concord, Inc. v. Harris Graphics Corp., 757 F. Supp. 1053, 1057
13 (N.D. Cal. 1991) ("Allegations such as 'during the course of
14 discussions in 1986 and 1987,' 'in or about May through December
15 1987,' and 'May 1987 and thereafter' do not make the grade.");
16 cf. Cooper, 137 F.3d at 627 (holding that the plaintiff satisfied
17 the requirements of Rule 9(b) where a complaint for excessive
18 revenue recognition identified some of the specific customers
19 defrauded, the four types of improper revenue recognition, the
20 general time frame in terms of financial quarters, that the fraud
21 arose out of financial statements, and that plaintiff was misled
22 by defendant's claiming that its policy was stricter than it
23 was).

24 Therefore, because plaintiff has not pled her allegations of
25 fraud with sufficient particularity, defendant's motion to
26 dismiss is GRANTED with leave to amend. See Doe v. United
27 States, 58 F.3d 494, 497 (9th Cir. 1995) ("In dismissing for
28 failure to state a claim, a district court should grant leave to

1 amend . . . , unless it determined that the pleading could not be
2 cured by the allegation of other facts.") (citations and
3 quotations omitted); see also Vess, 317 F.3d at 1107 (holding
4 that dismissals under Rule 9(b) are functionally equivalent to
5 dismissals under Rule 12(b)(6) and should be without prejudice if
6 defects are curable).

7 **CONCLUSION**

8 For the foregoing reasons, defendant Bankers' motion to
9 dismiss is GRANTED without prejudice. Plaintiff Calkins is
10 granted twenty (20) days from the date of this order to file a
11 first amended complaint in accordance with this order. Defendant
12 Bankers is granted thirty (30) days from the date of service of
13 plaintiff's first amended complaint to file a response thereto.

14 IT IS SO ORDERED.

15 DATED: January 14, 2009

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FRANK C. DAMRELL, JR.
18 UNITED STATES DISTRICT JUDGE
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